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Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

JOHN C. GARRISON,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Thirteenth Amendment to the Federal Constitution and the nature of petitioner's income producing labor establish that, as a free person, petitioner has a constitutional right to own the labor inherent in his body as property.

2. Whether as property, petitioner's labor merits at least the same protections that are extended to other forms of property under the Fifth Amendment to the Federal Constitution and for the purpose of tax classification by Congress.

3. Whether the denial of property status to petitioner's labor for the purpose of Congress taxing the income derived from that labor conflicts with this Court's determinations that taxes on

income are excises on a particular use, enjoyment or exercise of a single power over property incidental to ownership.

4. Whether the taxing of income derived from petitioner's labor, which for the purpose of taxation has been denied the status of property, constitutes a prohibited encroachment on petitioner's right to life protections and immunities under the United States Constitution's Fifth Amendment.

5. Whether petitioner's sale of his labor for the production of income for a livelihood is a "trade or business" within the meaning of 26 U.S.C. 162(a).

6. Whether with regard to federal tax legislation relative to wage income, Walters v. City of St. Louis, 347 U.S. 231 (1953), renders petitioner's claim of arbitrary discrimination res judicata as a claim upon which no relief can be granted within the meaning and intent of Rule 12(b)(6) of the Federal Rules of Civil Procedure.

7. Whether the evidence criteria formulated in Walters v. City of St. Louis, supra, requires courts as a matter of justice to apply the rule of strict scrutiny and issue written findings on supportive evidence introduced by taxpayer litigants in related claims.

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IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1991

No.

John C. Garrison, Petitioner

v.

United States of America, Respondent

PETITION FOR A WRIT OF CERTIORARI TO United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

John C. Garrison, the petitioner herein, in pro se, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered in the above entitled case on April 19, 1991.

OPINIONS BELOW

The April 19, 1991, Order of the United States Circuit Court of Appeals for the Ninth Circuit, which judgment is herein sought to be reviewed and is printed in Appendix A hereto, infra pages 70-77. The July 25, 1990 Judgment of the United States District Court for the Southern District of California printed in Appendix A hereto, infra pages 64-69. The March 1, 1990 notice of the Internal Revenue Service disallowing petitioner's claim for refund printed in Appendix B hereto, infra page 80.

JURISDICTION

The Order of the Court of Appeals was finally entered on April 19, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Article I, Section 8, clause 1 of the United States Constitution which provides in part as follows:

> The Congress shall have power to lay and collect taxes, duties, imposts and excises, . . . but all duties, imposts and excises shall be uniform throughout the United States.

This case also involves the Due Process Clause of the Fifth Amendment to the United States Constitution which provides as follows:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

This case also involves Section 1 of the Thirteenth Amendment to the United States Constitution which provides as follows:

> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or

any place subject to their jurisdiction.

This case also involves the Sixteenth Amendment to the United States Constitution which provides as follows:

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration.

This case also involves the following statutory provisions of the United States Code:

26 U.S.C. 61(a)(1)

(a) GENERAL DEFINITION -- Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, fringe benefits, and similar items.

26 U.S.C. 162(a)

(a) IN GENERAL -- There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business.

26 U.S.C. 212 (1)(2)
In the case of an individual, there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year --

(1) for the production or collection of income;

(2) for the management, conservation, or maintenance of property held for the production of income.

26 U.S.C. 262
Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.

This case also involves Rule 12(b)(6) of the Federal Rules of Civil Procure which provides as follows:

12(b) Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted. . . . If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not

> excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

STATEMENT OF THE CASE

This case involves a suit for tax refund under the provisions of 26 U.S.C. 6532, 7422 initiated in pro se by petitioner John C. Garrison, claiming arbitrary discrimination and denial of equal protection rights after paying all taxes due, filing a claim for refund, and the claim being disallowed by the Internal Revenue Service. As a construction electrician, petitioner is engaged in selling his skilled labor to various electrical contractors in exchange for wage income.

The original impetus leading petitioner to commence this action at the administrative level was his coming to be aware of what this Court had determined in Flint v. Stone Tracy Co., 220 U.S. 107 (1911), regarding the definition of the term "business."

Petitioner noted that in Flint, this Court had defined "business" in very broad terms and stated that it could include either a livelihood or profit motive:

> "Business" is a very comprehensive term and embraces everything about which a person can be employed (citation omitted). "That which occupies the time, attention, and labor of men for the purpose of a livelihood or profit" (citation omitted).

Flint, 220 U.S. at 171.

Added to this was petitioner's contemporaneous awareness that in an opinion concurring with the majority view in Butchers' Union v. Crescent City

Livestock, 111 U.S. 746 (1884), Justice Field had expressed that:

> The property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable.

Butcher's Union, 111 U.S. at 757.

Also that in a dissenting opinion in the Slaughter-House Cases, 83 U.S. 36 (1873), discussing the nature of the Civil Rights Amendments (13th, 14th, and 15th) to the Federal Constitution, Justice Swayne had observed that:

> Property is everything which has an exchangeable value, and the right of property includes the power to dispose of it according to the will of the owner. Labor is property, and as such merits protection. The right to make it available is next in importance to the rights of life and liberty. It lies to a large extent at the foundation of most other forms of property, and of all solid individual and national prosperity.

Slaughter-House Cases, 83 U.S. at 127 (emphasis added).

From this beginning, the view that developed in petitioner's thinking was

that if in fact labor is property in every basic legal sense, and if its production, conservation, maintenance and delivery is for the account of the wage earner, as it is in fact, then the sale of that labor for the production of income with a livelihood motive is just as much a "trade" or "business" as the sale of any commonly recognized property for the purpose of profit. This was reasoned in accord with the dual motives of either livelihood or profit affirmed in Flint.

Further research corroborated and enlarged petitioner's early views. The findings ultimately led petitioner to be persuaded that labor was indeed property in every essential legal sense and that it was established and protected as such under the Fifth and Thirteenth Amendments to the Federal Constitution.

Because of this, petitioner came to conclude that the allowance by Congress, for the purpose of tax deduction, of ordinary and necessary expenses related to activities for profit, while at the same time denying similar deductions to petitioner's income producing activity, constituted an unreasonable and arbitrary discrimination against him.

Petitioner reasoned that, as with a profit seeker with his or her property (the product sold for income), the production, maintenance, conservation and sale of petitioner's labor property also required directly related costs or expenses which were ordinary and necessary for those ends. 26 U.S.C. 162(a), 212 (1)(2).

Acting on the basis of this conclusion, on August 1989, petitioner filed a claim for refund of a portion of the taxes he had

already paid for the year 1987. The original return for this year in question had been filed timely and in accordance with all pertinent Revenue Service rules.

The claim for refund was sent in the form of an amended tax return claiming additional deductions resulting in a lesser tax liability. These deductions included basic support and subsistence costs, health maintenance, and transportation costs to and from work. For reasons he later elaborated with more clarity, petitioner identified these expenses as directly and sufficiently related to his income producing activity.

In March 1990, the Internal Revenue Service sent written notice to petitioner that his claim for refund had been disallowed. The reason given for the disallowance was that the expenses claimed

were personal in nature and therefore not deductible. 26 U.S.C. 262. Infra, page 80.

As a result of this, petitioner filed this suit for refund on the same month of March, 1990. The suit was filed in the United States District Court for the Southern District of California invoking 26 U.S.C. Sections 6532, 7422 and 28 U.S.C. 1346, 1491 for jurisdictional standing.

In his suit, petitioner claimed that the root cause of having expenses directly related to his income producing activity wrongfully disallowed by the Revenue Service was the way Congress had classified him as a taxpayer in his income producing activity.

The classification in question has been construed by the lower courts to have classified petitioner in the instant case as a taxpayer who in selling his labor engages in the activity as a propertiless creature seeking merely to satisfy his consumption and related needs as a human. Reading v. Commissioner, 70 T.C. 730, 733 (1978), aff'd. 614 F2d. 159 (8th Cir. 1980). Also, infra, pages 67-68.

The authority the lower courts have cited to base this conclusion is a classification identified and used deferentially by this Court in United States v. Gilmore, 372 U.S. 39 (1963):

> For income tax purposes Congress has seen fit to regard an individual as having two personalities: "One is [as] a seeker after profit who can deduct the expenses incurred in that search; the other is [as] a creature satisfying his needs as a human and those of his family but who cannot deduct such consumption and related expenditures" (citation omitted).

Gilmore, 372 U.S. at 44.

Petitioner claimed that this classification applied to him by Congress is arbitrary as so construed, failing to meet a test of constitutionality determined by this Court under equal protection in Walters v. City of St. Louis, 347 U.S. 231 (1954).

The Walters test, as it is now being referred to in this action, expressed that while equal protection does not require identity of treatment, it nevertheless requires that a tax classification bringing about disparate treatments be such that it:

> [1] rest on real and not feigned differences, [2] that the distinction have some relevance to the purpose for which the classification is made, and [3] that the different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary.

Walters, 347 U.S. at 237.

In building his case, petitioner used the three elements of the Walters test as a basis and guide to his claim in the pleadings. He sought to demonstrate with preponderance and clear particularity how it was that the classification at issue, as applied to petitioner's labor, failed to comply with all three elements of the Walters test.

Under the first element, petitioner argued the following points on the similarities between labor and capital assets for the production of income:

1. That labor was just as much property as any form of capital asset because it met the basic legal tests of property.
2. That unlike the labor of a slave, as a free person, petitioner owned his labor independently in the same manner that a profit seeker owns capital.

3. That both labor and capital are independent producers of wealth in the capitalist market system.

4. That Flint recognizes labor for livelihood to be "business" just as much as labor for profit.

5. That the judicial definition of "income" refers to labor and capital on equal terms as derivative sources of income.

6. That recent developments in Family Law and in what is referred to as "Human Capital Economics" demonstrate persuasively that labor is a form of capital asset.

Based on these arguments, petitioner concluded that the Congressional classification construed to deny these similarities between labor and capital was in fact an arbitrary discrimination resting on a travesty and economic

fiction.

Under the second element of the Walters test, petitioner essentially expressed that since the classification as construed by the lower courts rests on fictitious ground, it cannot be said to have a reasonable or rational relevance for the purpose the classification is made.

Under the third element of the Walters test, petitioner demonstrated the seriously disparate and unjust treatments the classification at issue brings as a result of its fictitious basis as applied to petitioner's labor. Petitioner argued the following:

1. That the classification brings about a legislated monopolistic privilege granting profit seekers the sole and exclusive right to deduct costs incurred in seeking a profit while expressly

denying an equal right to livelihood workers, such as petitioner, in the costs incurred for the production and conservation of their labor.

2. That the classification upholds a valued status for profit seekers as property owners while it alienates, cheapens and demeans the humanity of livelihood workers such as petitioner by stripping their labor of property value.

3. That it respects the rights of profit seekers in the occupations of their choice while punishing and penalizing petitioner in the exercise of his constitutional rights to follow the callings and occupations of his choice and to secure his existence.

4. That it arbitrarily legislates unequal treatment under legislative grace by classifying the entire receipts of petitioner as "gross income" [26 U.S.C. 61(a)(1)] while designating similar

earnings of profit seekers as "gross receipts." Doyle v. Mitchell Bros. Co., 247 U.S. 179, 183-185 (1918).

5. That in this manner the classification protects a profit seeker's break-even return of invested capital against confiscation and double-taxation, while it transforms petitioner's labor into a virtual chattel of Congress by bringing the entire receipts therefrom, with break-even return of investment included, completely under the sovereign power of Congress' legislative grace over "gross income," Helvering v. Independent Life Ins. Co., 292 U.S. 371, 381 (1934), and, under the guise of taxing "gross income," Congress thereby subjects petitioner's break-even return and his entire means of existence to any degree of arbitrary confiscation under color of law.

6. That because this act brings petitioner's entire means of existence

under the grace of Congress while sparing profit seekers from such treatment, petitioner charged that the classification is also a hostile discrimination and assault against his constitutional right to life protection and immunities.

Thus, petitioner argued that the classification imposed on him as a livelihood worker failed to meet the equal protection requirements expressed in the Walters test. This, in essence, is his claim as originally stated.

Because he was asserting fundamental rights and liberties under equal protection, petitioner contended that his claim was entitled to the application of close scrutiny. Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966); Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976); Vance v.

Bradley, 440 U.S. 93 (1979).

The relief petitioner sought was enforcement of constitutional protections under the Fifth Amendment (due process) and Article I, Section 8, clause 1 of the Federal Constitution (uniformity rule). Prior to the initial hearing at the District Court, petitioner added 42 U.S.C. 1983.

In response to petitioner's claim as above described, the respondent filed a motion to dismiss the complaint on the alleged ground that the claim was legally insufficient for obtaining relief in the courts. F.R. Civ. P. 12(b)(6).

In this motion, respondent expressed that the deductions petitioner was seeking to have allowed were prohibited by the Congressional classification described in

United States v. Gilmore, supra, and specifically denied in Reading v. Commissioner, supra. The respondent also expressed that the Walters case, supra, disposed of the instant case because the taxpayers in Walters raised the same issue and did not prevail. For these reasons, the respondent stated that petitioner's complaint was such upon which no relief could be granted.

In response to these arguments, petitioner answered, first of all, that in reviewing the legal sufficiency of a claim, the applicable standards expressed by the Ninth Circuit Court limited the task of the lower court. De La Cruz v. Tormey, 582 F2d 45, 48 (9th Cir. 1978). Involved in this limit was accepting the material allegations in the complaint as true and construed in the most favorable light to the pleader. NL Industries, Inc. v.

Kaplan, 792 F2d 896, 898 (9th Cir. 1986); Allison v. California Adult Authority, 419 F2d 822, 823 (9th Cir. 1969).

Petitioner also brought to the attention of the lower court the policy of the Ninth Circuit entitling pro se litigants to procedural protections. Eldridge v. Block, 832 F2d 1132, 1136 (9th Cir. 1987).

On the basis of these standards and policies, petitioner pleaded that all the lower court needed to do was to consider whether the claim made by petitioner, if proven true, was entitled to relief which could be granted in court.

Secondly, petitioner expressed that since his claim was one of violation of equal protection rights, the lower court was competent and legally empowered to grant relief in the form of enforcing

constitutional protections.

Based on these premises, petitioner concluded that he had stated a valid claim upon which relief could be granted.

Finally, with regard to respondent's attack on the merits of the complaint, petitioner sought to demonstrate that the respondent had based its conclusions on false representations and assumptions, critical omissions, and failure to make vital distinctions in the case law it cited.

To support this contention, petitioner demonstrated, among other things, the distinguishing significance of the Reading and Gilmore cases. In the case of Reading, this was based primarily on a demonstration of erroneous concepts of labor and property on which the Reading

decision rested. In the case of Gilmore, the defense was based primarily on distinguishing the different significance Gilmore has in the instant case and demonstrating this Court's affirmation of the Flint definition of "business" in Commissioner v. Groetzinger, 480 U.S. 23 (1987), and how it applied to the instant case.

With regard to the Walters case, petitioner demonstrated how this case was not dispositive of the instant case. This was based primarily on a showing that the "rejection" in Walters was not a result of the main issue of discrimination being definitively tried and rejected. That the rejection was, instead, a rejection based on lack of ripeness for review as to the main issue (347 U.S. at 233), and the narrow aspect of the case actually considered by this Court (something

similar to a petition for declaratory judgment) being prosecuted with virtually no evidence introduced to prove that a legislative usurpation of power had actually taken place. 347 U.S. at 232, 233.

By comparison, petitioner pointed out that not one of these deficiencies in the Walters case is present in the instant case. Also, that the very fact Walters was granted certiorari by this Court notwithstanding its many weaknesses and its lack of ripeness, and the fact that in a concurring opinion Justices Douglas and Black called the issue of arbitrary discrimination in Walters "serious and substantial" under equal protection (347 U.S. at 238), and that they looked "for a future day" (Id., at 238) to review the issue, indicated that the nature and intent of Walters was not to act as an

absolute bar rendering all such claims peremptorily res judicata.

On the basis of these considerations, petitioner pleaded that the District Court deny respondent's motion to dismiss.

On July 23, 1990, hearing on the motion was held by the District Court. In lieu of oral argument, petitioner simply expressed that he felt he had answered respondent's allegations adequately in his opposition papers and that he would rest his position on the contents of those papers. The District Court accepted this without discussion and, on July 24, 1990, issued a "Memorandum Decision and Order."

In its Memorandum, and without so designating it, the District Court sua sponte effectively converted respondent's motion to dismiss into a summary judgment

on the merits of the complaint, delivering a decision explicitly denying that petitioner's labor is property (See, infra, pages 67-68), and implicitly adjudging the opposing evidence introduced by petitioner to support his claim as being devoid of merit. On that basis, the District Court granted respondent's motion to dismiss without discussing or issuing written findings on petitioner's opposing evidence and material allegations.

In August 1990, an appeal of this decision followed and was filed with the Ninth Circuit Court. In his opening brief, petitioner expressed his belief that the District Court had made an error in determining that his labor is not property and that his claim was legally insufficient.

Among other things, petitioner sought to

demonstrate how pivotal and determinative the correct understanding of the nature of human labor was to the disposition of the instant case and how erroneous the District Court was in denying the property nature of petitioner's labor. In this regard, petitioner pointed out:

1. That the District Court based its premises and conclusions on two distinctions it employed under the Walters test as it applied it to petitioner's claim.

2. That the first distinction is found in the Tax Court decision of Reading v. Commissioner, supra: (1) the sale of physical products is the sale of "property"; (2) the sale of human labor is not the sale of "property" because human labor is not a physical product. Human labor is "behavior performed by human beings in exchange for compensation." 70 T.C. at 733.

3. That the second distinction is also found in the Reading decision and in the Gilmore case. That in Reading, the distinction appears implicitly as follows: (1) "business" includes only the sale of "property" and only physical products are "property"; (2) "business" does not include the sale of human labor because human labor is not physical and therefore not "property." Id., at 733, 734.

4. That in Gilmore, the second distinction is found in the Congressional tax classification identified by this Court and construed by the lower courts as follows: (1) "business" includes only the activities of profit seekers; (2) "business" does not include the activity of labor sold for wage income because this activity is not for profit. Gilmore, 372 U.S. at 44.

With regard to the issue of whether labor

is property, petitioner demonstrated that up to the middle of this century, judicial authorities in various jurisdictions had consistently held that labor was property. Petitioner included the affirmative expressions made by Justices Swayne and Field (supra, page 8).

Petitioner, in effect, pointed out that the 1978 Reading Tax Court became the first judicial tribunal to contradict long-standing authorities which affirmed labor was property. This was demonstrated by pointing the fact that no authority other than the Congressional classification at issue was cited by the Reading Court to justify its definition of labor as a non-property entity. 70 T.C. at 734.

Petitioner also pointed out the following:

1. That standard legal definitions of

labor and property contradict the narrow views originally stated in Reading expressing that only something physical is property and that labor is propertiless "behavior."

2. That the Thirteenth Amendment to the United States Constitution establishes that every free person has a constitutional right to own their labor to the exclusion of others and that this Court has recognized this to be an essential right of property. Pruneyard Shopping Center v. Robins, 447 U.S. 74, 82 (1980).

3. That a laboring person could not legally claim his or her wages in exchange for the labor performed unless the labor expended was something of the nature of property: (1) there was the right to exclude others, (2) the right to dispose of it according to the will of the owner, and (3) it was something of exchangeable

value.

4. That labor is not a detached lifeless commodity. That it is an inherent and inalienable part of a human being's life. And that it cannot therefore be rationally said that labor is not the property of the laborer any more than it can be said that his life is not his own.

5. That labor is inherently human energy which in its essence is not physical. But that, by comparative example, electrical energy sold by the utilities is also not physical, yet it is unquestionably property.

With regard to whether petitioner's income producing activity is a "trade or business" within the meaning of 26 U.S.C. 162(a), petitioner reiterated his reliance on the Flint and Groetzinger cases to support his contention that his income producing activity for a livelihood was a

"trade or business."

He pointed out that the test applied to the activity of a full-time gambler in Groetzinger applied to petitioner in the instant case as well:

Petitioner has pursued his activity of selling his labor energy and skills on a full-time basis, in good faith, with continuity and regularity, representing a constant and large-scale effort over 20 years, to the production of income for a livelihood, with skill being required and applied, and is not a sporadic activity, a mere hobby, or an amusement diversion. Groetzinger, 480 U.S. at 35, 36.

With regard to the District Court's use of a passage out of Walters to justify its dismissal of the instant case, petitioner expressed that placed in the overall

context of that case and the deplorable weaknesses with which it was fraught, the passage was not intended as a final word rendering all claims as those in Walters res judicata.

Petitioner contended that the passage in Walters was a reflection of what the specific facts in that specific case allowed this Court to say or not say:

> [W]e cannot say that a difference in treatment of the taxpayers deriving income from these various sources [wage earners versus profit earners] is per se a prohibited discrimination. There is not so much similarity between them that they must be placed in precisely the same classification for tax purposes.

Walters, 347 US at 237.

Seeking to elucidate the intent of this passage, petitioner expressed that so far as was apparent to this Court in Walters, and on the basis of what it could see at that point in time or could be shown by the taxpayers in that case to the

contrary, not so much similarity between the activities of wage earners and profit seekers could be perceived to enable this Court to grant declaratory relief by saying that the two activities should share common ground in a tax classification.

Petitioner pointed out that the fact this Court in Walters went on to formulate a test for the constitutionality of tax classifications such as in Walters indicated the prescriptive nature of the case. That its intent was to lay out a criteria for evidence and not a bar to prevent litigant taxpayers from obtaining legal relief should they meet the criteria of evidence.

On the basis of these pleadings, petitioner prayed the Appeals Court to reverse the District Court's decision.

The respondent replied to these pleadings by directing the bulk of its response to three objectives: (1) to seek to prove that the expenses petitioner was claiming were not business related and therefore not deductible, (2) to seek to prove that this Court's decision in Portland Golf Club v. Commissioner, 110 S. Ct. 2780 (1990), established that, in the instant case, petitioner's income producing activity is not a "trade or business" because the activity is not pursued for the purpose of profit, and (3) to convince the Appeals Court that petitioner was nothing more than a "standard" tax-protestor raising "familiar tax-protestor themes" who should be sanctioned for wasting the resources of the judicial system by bringing up frivolous appeals, adding that the rule of strict scrutiny should not be applied.

With regard to the expenses at issue, the respondent essentially expressed that the reason why they were personal expenses and therefore not deductible was that they did not have a requisite or sufficiently direct connection with a business activity involving the profit motive.

With regard to this Court's decision in the Portland Golf Club case, respondent placed its reliance on this Court's reference to Groetzinger ("to be engaged in a [Sec. 162] trade or business, . . . the taxpayer's primary purpose for engaging in the activity must be for income or profit"). Portland Golf Club, 110 S. Ct. at 2787.

In a Reply Brief, petitioner demonstrated, first of all, how it was that the expenses he was claiming were ordinary and

necessary, as well as sufficiently connected to his income producing activity.

In this regard, petitioner reasoned as follows:

1. That since labor is essentially human energy, human energy is petitioner's stock-in-trade.
2. That given labor is human energy as well as property, petitioner's human energy is therefore petitioner's income producing property.
3. That since petitioner cannot produce, maintain or conserve his human energy without nutrients derived from food, or in a disembodied state, the expenses incurred for food and for maintaining bodily health are ordinary and necessary expenses directly and sufficiently connected to his income producing property--his

human energy. 26 U.S.C. 162(a), 212 (1)(2).

With regard to Portland Golf Club, petitioner reasoned that even the most narrowly stated criteria in this case for a "trade or business," that "the taxpayer's primary purpose for engaging in the activity must be for income or profit" (110 S. Ct. at 2787), did not on its face present a problem for petitioner's allegations in the instant case. This is true because of the two items of "income" or "profit" mentioned, it is a matter of public record that petitioner's activity at issue does have the production of (wage) income as a primary purpose.

On April 19, 1991, the Ninth Circuit Court entered its final decision and order in the instant case, affirming the decision of the District Court. Infra, pages 70-

77. In doing so, the Appeals Court also failed to discuss or issue specific written findings on evidence and material allegations introduced by petitioner to support his claim.

REASONS FOR GRANTING THE WRIT

1.
Certiorari Should Be Granted In Order To Determine Whether Human Labor Is A Form of Property Protected By The Federal Constitution

1.1 Human Labor As Property

The Courts below have construed that for the purpose of taxation, Congress has denied petitioner's income producing labor the status of property. Petitioner has claimed that this act constitutes a deprivation of fundamental rights protected by the Federal Constitution.

In the entire history of this Court only two Justices have expressed an opinion regarding the nature of human labor: Justice Swayne in a dissenting opinion in the Slaughter-House Cases, 83 U.S. 36, 127 (1873), and Justice Field in a concurring opinion in Butchers' Union v. Crescent City Livestock, 111 U.S. 746, 757 (1884).

In eloquent terms, both Justice Swayne and Justice Field expressed their view that human labor is the most fundamental form of property. (See supra, page 8). If this is true, then in the instant case this Court is faced for the first time with the most direct and ripe opportunity to settle the question as a majority.

The question is an important matter of federal law because it involves a controversy concerning the most fundamental of human rights protected under the Due Process Clause of the Fifth Amendment to the Federal Constitution. These are the rights to equal protection, to liberty, and the right to be secure and inviolable in one's life and property.

The notion that petitioner's labor is propertiless "behavior" is ultimately traced to the 1978 Tax Court decision of Reading v. Commissioner, supra. The reason the Reading Tax Court gave for denying that labor was property was that labor was not a physical product that could be sold. 70 T.C. at 733.

Prior to Reading, and up to the middle of this century, various other jurisdictions had consistently held that labor was property. See, for example, Fidelity & Deposit Co. v. Studds, 136 F. Supp. 756, 762 (1956); Jones v. Leslie, 112 P. 81, 82 (1910); Jordan v. State, 103 S.W. 633, 634 (1907); Mathews v. People, 67 N. E. 28, 32, 33 (1903).

If petitioner's income producing labor is not at all property, then it cannot be his or anyone else's property. Then the income petitioner derives from his propertiless labor is more of the nature of a gift than compensation in exchange for property received. Yet, petitioner's receipts from his labor are taxed as compensation "income." 26 U.S.C. 61(a)(1).

But if petitioner's labor is his property, then the decisions of the lower courts in the instant case constitute a very grave and unconscionable miscarriage of justice under the Fifth Amendment against a free citizen pleading, in pro se, for an impartial review of his claim.

1.2 Human Labor And the Thirteenth Amendment

Throughout the proceedings in the Courts below, petitioner has been contending, directly and in effect, that the essential intent of the Thirteenth Amendment to the Federal Constitution is to establish who may and who may not own a freed or free person's life and labor as property.

Prior to the abolishment of slavery, the life and labor of a slave, as

well as the wealth these could produce, were owned by the slave master as property. In other words, the title to such property was the sole possession of the master. See, for example, in an opinion delivered by Justice Daniel where he expresses that a slave "is himself strictly property, to be used in subserviency to the interests, the convenience, or the will, of his owner." Dred Scott v. Sandford, 19 How. 393, 475, 476 (1856). (Emphasis is in original.)

Petitioner has, in effect, contended that the Thirteenth Amendment did not abolish the economic concept that human labor can be owned as property, but that the title of ownership to such property can only be held, in exclusivity, by he or she who possesses that labor in their bodies

as a freed or free person.

In view of the seriousness of this issue as it relates to the instant case, this is an important question of federal law which has not been decided by this Court.

1.3 Human Labor And The Right To Life

The question, that whether by arbitrarily denying petitioner's labor the status of property for the purpose of taxation Congress has wrongfully encroached on petitioner's right to life protections and immunities, is an important federal question this Court has not decided.

In this regard petitioner has contended before the lower courts that the labor inherent in his body is inextricably and intrinsically one

with his life, and that, therefore, to deny that his labor is his property is the same as to deny that his life is his property.

Because this act ultimately brings petitioner's existence under the power of Congress' legislative grace, petitioner has contended that it is a hostile and prohibited encroachment on his right to life protections and immunities under the Fifth Amendment because the Framers of the Amendment held human life to be sacred, inalienable, and inviolable in the entire psychic/biologic continuum of the person against any form of government tyranny or arbitrary ascendancy, without due process.

1.4 Wage Labor As "Trade or Business"

In Commissioner v. Groetzinger,

supra, this Court dealt with the question as to whether an individual taxpayer, a full-time gambler, was in that activity engaged in a "trade or business" within the meaning of 26 U.S.C. 162(a).

For reasons already given (supra, page 34), petitioner has contended in the lower courts that the criteria applied to the individual taxpayer in Groetzinger is just as applicable to petitioner's activity in the instant case. Respondent, however, has alleged that this Court's decision in Portland Golf Club v. Commissioner, supra contradicts petitioner's allegations relative to Groetzinger.

In view of the fact (1) that in Portland Golf Club this Court did not deal with an individual taxpayer as

it did in Groetzinger, and (2) that in Groetzinger, this Court affirmed the validity of Flint's definition of "business" (480 U.S. at 31), and (3) that in Groetzinger this Court committed itself to the precept in Higgins v. Commissioner, 312 U.S. 212 (1945), that issues related to these cases "requires an examination of the facts in each case" (Id., at 36), and (4) that this Court has expressed that prior to Groetzinger no "broadly applicable authoritative judicial definition" of "trade or business" has emerged (Id., at 27), and (5) that this Court has not since Groetzinger applied its findings there to the specific controversy in the instant case, petitioner prays this Court to decide this aspect of the important federal matter here at issue.

2.
Certiorari Should Be Granted In Order To Resolve Conflicting Decisions Between The Ninth And Tenth Circuit Courts Of Appeals On The Nature And Intent Of Walters v. City of St. Louis

2.1 The Nature and Intent of Walters v. City of St. Louis

Throughout the proceedings of this case, petitioner has been contending that in Walters v. City of St. Louis, supra, this Court did not review an actual question of arbitrary discrimination. Petitioner has contended that the only issue this Court reviewed in Walters was whether an unimplemented State tax classification, existing only on paper, with language directing different treatments to wage income and profit income, did on its face violate the Fourteenth Amendment's Equal Protection Clause. 347 U.S. at 233.

Petitioner has claimed that this Court explicitly stated in Walters that it would not review "any question of discrimination" arising from the regulations at issue in that case or "any question as to the interpretation or validity thereof" because the questions had not been reviewed and decided by the lower court. Id., at 233. Because the instant case deals with an actual question of discrimination relative to fully implemented statutes, and Walters did not decide such a question, petitioner contends that Walters is, on these grounds, distinguishable from the instant case.

The Tenth Circuit Court of Appeals is in accord with petitioner's assessment

that in Walters this Court did not consider an issue of discrimination. In Justheim Petroleum Co. v. Hammond, 227 F.2d 629 (10th Cir. 1955), the Tenth Circuit referred to the Walters case as one example to support the statement that "[i]t is settled that issues which are not raised and presented to the trial court will not be considered on appeal." 227 F.2d at 633.

In the instant case, the Ninth Circuit has contradicted the assessment of the Tenth Circuit by deciding the instant case on the premise that in Walters this Court did in fact review an actual question of discrimination indistinguishable from that in the instant case. Infra, pages 73-74.

3.
Certiorari Should Be Granted To Determine Whether The Appeals Court Has Decided A Federal Question In Conflict With Decisions Of This Court Regarding The Nature Of Taxes On Income.

3.1 Property And Income Tax As An Excise

In various decisions of this Court, it has been very clearly established that the Federal Constitution recognizes only two main classes of taxes. They are referred to as direct and indirect taxes. Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895); Brushaber v. Union Pacific Railroad Co., 240 U.S. 1 (1916); United States v. Ptasynski, 462 U.S. 74 (1983).

Explaining the nature of the Sixteenth Amendment to the Federal Constitution, this Court in Brushaber expressed that the taxes on income which formed the content of the

Amendment were indirect or excise taxes referred to under Article 1, Section 8, clause 1 of the Federal Constitution, subject to the rule of uniformity. Brushaber, 240 U.S. at 17.

In Bromley v. McCaughn, 280 U.S. 124 (1929), and Fernandez v. Wiener, 326 U.S. 340 (1945), this Court expressed that excise taxes, as are taxes on income, are taxes on a particular use, enjoyment or exercise of a single power over property incidental to ownership.

In conflict with these decisions, the Appeals and District Courts in the instant case have upheld an income or excise tax on an object which these Courts have denied is related to property. If petitioner's labor is

not property, but merely "behavior," then an income (excise) tax on his wages does not apply because in tendering out his "behavior," petitioner has not used, enjoyed or exercised a power over anything of the nature of property. Yet, Congress, though having classified petitioner's labor as propertiless, has nevertheless imposed an excise (income) tax on the receipts from that labor.

As a result, in taxing petitioner's receipts from labor in the manner it does, Congress has exceeded its constitutional limitations and arbitrarily usurped power. It has invented an excise tax that has no relation to anything of the nature of property, something outside of what this Court has constructed to be

within the constitutional meaning of "excise."

4.
Certiorari Should Be Granted In Order To Determine Whether The Appeals Court Has Sanctioned A Departure By The District Court From Accepted And Usual Course Of Judicial Proceedings Relative To The Legal Sufficiency Of Petitioner's Claim.

4.2 Applicability of Fed. R. Civ. P., Rule 12(b)(6)

The District and Appeals Court have both concurred that petitioner's claim lacks legal sufficiency under Fed. R. Civ. P., Rule 12(b)(6). At the same time, the Appeals Court expressed that it has never rejected the specific claim made by petitioner--"that Congress violated the Equal Protection Clause when it enacted 26 U.S.C. 262." (See, infra, page 76).

To justify its denial of review, the Appeals Court has expressed that in Walters v. City of St. Louis, supra, this Court has in effect tried petitioner's claim in the instant case and denied it had legal sufficiency.

The Appeals Court has determined that the Walters case renders petitioner's claim res judicata as legally insufficient because in Walters this Court, dismissing the narrow issue it considered in that case, compared that issue with general tax legislative practice at the federal level. Infra, page 73.

If Walters has already rendered petitioner's claim legally insufficient, then it is outside of matters of law to be tried in court.

If it is outside of law, then no legal test designed to test a matter of law is relevant to petitioner's claim. Yet, the District Court applied the Walters test to test whether the claim made by petitioner in the instant case was valid or not. This inconsistent and contradictory action by the District Court was upheld and affirmed by the Appeals Court.

A second inherent contradiction in the decision of the District Court affirmed on appeal is that if in fact the Walters case has already disposed of the specific federal issue raised by petitioner in the instant case, the District Court's trial of the issue in specific terms and ways this Court never applied or sanctioned in Walters is irrelevant. It is, in effect, attempting to guess what this

Court would hypothetically say or do, had it in Walters been confronted with facts similar to the instant case, which it was not.

A third inconsistency in the decisions of the District and Appeals Courts in the instant case is the way in which these courts applied the Walters test, contradicting the expressions of this Court in Walters.

Petitioner finds it difficult to conceive that a legal test can be applied to a matter in controversy where only one side of an argument is tested. Yet, this is what the lower courts have done in the instant case. The respondent's side of the argument was tested and largely accepted as valid while petitioner's material evidence is not so much as mentioned,

giving the impression that petitioner merely walked into the courts with a bare claim of discrimination with nothing at all to support it. The record, however, denies that this is what happened.

In Walters, and referring to Green v. Frazier, 253 U.S. 233, 239 (1920), this Court expressed that "clear and demonstrated usurpation of power will authorize judicial interference with legislative action." 347 U.S. at 238. But, in the instant case, the lower courts have knowingly acted in conflict with this Court's expression and what justice demands by deliberately suppressing the evidence petitioner introduced to support his claim that a usurpation of power by Congress has taken place against petitioner's fundamental rights as a

free person.

Petitioner has contended that his claim was entitled to strict scrutiny and the lower courts have unjustly denied it.

CONCLUSION

Wherefore, petitioner respectfully prays that a writ of certiorari be granted.

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APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JOHN C. GARRISON,
FILED

JUL 25, 1990
CLERK

Plaintiff,

vs. NO. 90-0264-JLI(CM)

UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM DECISION AND ORDER

The motion to dismiss of defendant United States of America ("U.S.A.") came on for hearing on July 23, 1990, at 10:30 a.m., before the Honorable J. Lawrence Irving, District Judge. Plaintiff John C. Garrison appeared in propria personam, and Greg Addington appeared on behalf of the defendant.

Having considered all pleadings, declarations and the written and oral arguments of counsel and law in support thereof, the court hereby grants the defendant's motion to dismiss.

FACTS

In April of 1987, plaintiff John C. Garrison, a construction electrician, timely filed his 1987 income tax return and paid the tax which he computed was due. Soon thereafter he filed an amended income tax return (claim for refund) which claimed various additional deductions resulting in a lesser tax liability. These deductions included basic support and subsistence costs, including food, shelter, health maintenance, and transportation costs to and from his workplace.

Because the Internal Revenue Service ("I.R.S.") disallowed the refund which the plaintiff requested, the plaintiff filed this action on March 2, 1990. He claims the I.R.S. has violated the Equal Protection Clause of the U.S. Constitution by allowing businesses -- but not individuals -- to deduct operating

expenses from taxable income. An individual, the plaintiff claims, is a company in the business of "earning wages" and should be permitted to deduct his or her "operating" costs (i.e., food, transportation, etc.) in the same manner that businesses deduct their operating expenses (i.e., advertising, rent, etc.). As an individual whose constitutional rights have been violated by the alleged discrimination of the I.R.S., the plaintiff seeks the refund which he was denied by the I.R.S.

The defendant has filed a motion to dismiss the action. The plaintiff opposes the motion.

DISCUSSION

Dismissal of this action is appropriate because the plaintiff has filed to state a cause of action upon which relief can be granted. F. R. Civ. P. 12(b)(6). The Supreme Court has held

that Equal Protection does not require identity of treatment under the tax code. Walters v. City of St. Louis, Missouri, 347 U.S. 231, 237 (1954). "It only requires that classification rest on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification was made, and that the different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary." Id.

All three of these factors are met in the instant case. First, there is a real difference between the taxing of individuals and the taxing of businesses. As the United States Tax Court has stated, "the sale of one's labor is not the same creature as the sale of property. . . . One's gain, ergo his "income," from the sale of his labor is the entire amount received therfor (sic) without any

reduction for what he spends to satisfy his human needs." Reading v. Commissioner, 70 T.C. 730 (1978), aff'd, 614 F.2d 159 (8th Cir. 1980). A business is a "seeker after profit," while an individual is "a creature satisfying his needs." U.S. v. Gilmore, 372 U.S. 39, 44 (1962).

Second, the different tax treatment of individuals and businesses is relevant to the distinction between them. Since "[t]he sale of one's labor is not the same creature as the sale of property," it follows that individuals and businesses can be given different tax treatment. Reading v. Commissioner, 70 T.C. 730 (1978), aff'd, 614 F.2d 159 (8th Cir. 1980).

Finally, the different treatment is not so disparate, relative to the difference in classification, as to be wholly arbitrary. As the Supreme Court

has stated: "[w]e cannot say that a difference in treatment of the taxpayers deriving income from these various sources [wage earners versus profit earners] is per se a prohibited discrimination. There is not so much similarity between them that they must be placed in precisely the same classification for tax purposes. Walters v. City of St. Louis, Missouri, 347 U.S. 231, 237 (1954).

The I.R.S.'s refusal to allow the plaintiff to deduct his basic living expenses from his income tax therefore does not violate the Equal Protection Clause of the U.S. Constitution. Accordingly, the defendant's motion to dismiss is hereby granted. IT IS SO ORDERED.

Dated: 7-24-90

S/S J. Lawrence Irving
J. LAWRENCE IRVING,
JUDGE
UNITED STATES DISTRICT
COURT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 90-56037

JOHN C. GARRISON,

Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA,

Defendant-Appellee.

FILED
APR 19, 1991
CLERK
D.C. NO. 90-0264-JLI(CV)

MEMORANDUM*

Appeal from the United States
District Court for the
Southern District of California
J. Lawrence Irving, District Judge,
Presiding

Submitted April 5, 1991**
Pasadena, California

Before: SCHROEDER, REINHARDT, Circuit Judges, and KING, Senior U.S. District Judge ***

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

*** Hon. Samuel P. King, Senior U.S. District Judge for the District of Hawaii, sitting by designation.

John Garrison appeals the District Court's dismissal of his action for a tax refund, pursuant to Fed. R. Civ. P. 12(b)(6). The Government seeks sanctions in the amount of $1500 against Garrison for bringing a frivolous appeal. We affirm the decision of the District Court and deny the Government's request for sanctions.

John Garrison timely filed his 1987 Federal Income Tax return and paid the tax which he computed to be due. He thereafter filed an amended tax return, in which he claimed additional deductions and sought a tax refund. Those deductions include basic support and subsistence costs such as food, shelter, health care and commuting costs to and from work. The I.R.S. denied the refund because the claimed deductions are disallowed by Congress under 26 U.S.C. 262 and the administrative rules promulgated by the

I.R.S.

Garrison then filed a pro se action for a refund in the United States District Court for the Southern District of California. He alleged that Congress violated the Equal Protection Clause when it enacted 26 U.S.C. 262. He claimed that there is no rational basis for disallowing individuals the right to deduct their production costs from their gross income when computing their taxable income, while allowing businesses the right to make similar deductions under 26 U.S.C. 162. Upon motion by the I.R.S., the District Court dismissed Garrison's claim pursuant to Fed. R. Civ. P. 12(b)(6). The District Court also held that Congress did not violate the Equal Protection Clause when it enacted 26 U.S.C. 262.

We review de novo a District Court's dismissal of a taxpayer's suit for failure to state a claim upon which relief can be

granted. Grimes v. Commissioner, 806 F.2d 1451, 1453 (9th Cir. 1986).

The Supreme Court has held that a classification giving different tax treatments to income derived from labor, and profit income derived from self employment does not violate the Equal Protection Clause. See Walters v. City of St. Louis, 347 U.S. 231 (1954). The Supreme Court said:

> Equal protection does not require identity of treatment. It only requires that classification rest on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary.

Id. at 237. In Walters the Supreme Court upheld the State classification, noting that affording incomes different tax treatments according to their sources as earned income or business profits is an extensive practice at the federal level. Such classifications do not systematically

favor one type of income over the other and are not per se discriminatory. Id. at 236. The Supreme Court also found that wage and salary incomes, and profits from self employment are not so similar as to require inclusion in precisely the same tax classification. Id.

Here, the District Court applied the Walters test to 26 U.S.C. 262, and held that Congress did not violate the Equal Protection Clause when it enacted this section of the I.R.S. Code. The District Court found that individuals and businesses have "real and not feigned" differences. It further found that the difference in tax treatments is relevant to the differences between individuals and businesses. Finally, the District Court found that (1) a different tax treatment between wage and profit earners is not per se discriminatory, (2) there is not so much similarity between them as to require

their inclusion in precisely the same tax classification, and (3) their different tax treatments are not so disparate as to be arbitrary. The District Court's holding was correct as a matter of law and we affirm.

The Government has requested that, pursuant to 28 U.S.C. 1912[1] and Fed. R. App. P. 38[2], we sanction Garrison in the amount of $1500 for bringing a frivolous appeal. Those provisions permit us to sanction litigants who bring appeals for the purpose of delay, or whose appeals are groundless. See Grimes, 806 F.2d at 1453-54.

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[1] 28 U.S.C. 1912 states: "Where a judgment is affirmed by . . . a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single and double costs."

[2] Fed. R. App. P. 38 states: "If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single and double costs to the appellee."

Here, however, Garrison paid his taxes, then filed for a refund. He did not violate any laws, and never attempted to obstruct or delay the tax authorities. It is true that Garrison's appeal is devoid of merit. Nevertheless, his specific claim that Congress violated the Equal Protection Clause when it enacted 26 U.S.C. 262 has never been rejected in this Circuit. Moreover, as the Government correctly points out, the idea of allowing some personal expenses to be deducted has already been accepted by Congress. See 26 U.S.C. 163, 164 and 165(c). Garrison, a pro se litigant, was seeking peaceably to change the laws that govern him albeit in the wrong forum. As we said in Grimes: "We are sensitive to the obligation of the courts to provide access for petitioners seeking in good faith to avail themselves of the protection of the law. . . . We are also aware that an appeal that lacks

merit is not always frivolous." Grimes, 806 F.2d at 1454 (emphasis added). We do not find this appeal frivolous and deny the Government's request for sanctions.

AFFIRMED.

APPENDIX B

Department of the Treasury
Internal Revenue Service
Fresno, CA 93888

March 1, 1990

Tax Period(s): Dec. 31, 1987

John C. Garrison
3523 Mt. Acomita Avenue
San Diego, CA 92111

Dear Taxpayer:

We are sorry, but we cannot allow your claim(s) for refund or credit for the period(s) shown above. This letter is your legal notice that your claim is fully disallowed.

We have disallowed the claim because the expenses you have claimed on your 1040X are personal in nature and as such are not deductible as a business expense.

If you have any questions, please write us at the address shown on this letter. If you prefer, you may call the IRS telephone number listed in your local directory. An employee there may be able to help you, but the office at the address shown on this letter is most familiar with your case.

CERTIFICATE OF SERVICE

I hereby certify that three true and exact copies of the foregoing have been forwarded by pre-paid certified mail to:

Solicitor General
U.S. Department of Justice
Washington, D.C. 20530

on this _____ day of _____, 1991.

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